United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7273

ORIGINAL

To be argued by
Morris Zweibel.

United States Court of Appeals

For the Second Circuit.

B
P/S

FELIX MERCED and MODESTA MERCED,
Plaintiffs-Appellants,

against

AUTO PAK COMPANY, INC.,
Defendant-Appellee,

S & C LIQUIDATING CORP., AUTO PAK DIVISION OF FLINCHBOUGH PRODUCTS, DIVISION OF GULF & WESTERN SYSTEMS CO., ALBERT SHAYNE and ARTHUR CONTENT,
Defendants.

AUTO PAK COMPANY, INC.,
Third Party Plaintiff,

against

SOUTHBRIDGE TOWERS, INC.,
Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief Submitted on Behalf of Third Party Defendant, Southbridge Towers, Inc.

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Facts.

The plaintiff sued to recover damages for injuries allegedly sustained in an accident that occurred on July 13, 1972, while in the employ of the third party defendant,

Southbridge Towers, Inc., as a porter at Southbridge's premises located at 90 Beekman Street, New York City (19a). His general duties consisted of maintaining the building, as well as operating the compactor and chutes (468a, 469a).

The employer had purchased a compacting device for garbage from the defendant-appellee, Auto Pak, in 1970. This machine was installed by Universal Thermal Industries, and no issue was raised with respect to the manner in which the said machine was installed.

The plaintiff's experience with this machine began with his observation of the operation of a compactor in March of 1971 (534a). Thereafter, he observed the operation of the compactor involved in the accident for about three months (484a, 488a). He had watched as the machine was turned on (538a). In May of 1972, he started operating the compactor (550a). At his examination before trial, he dated time start of this work in April, 1972 (551a).

It was his testimony that he reached into the compactor to take out a piece of wood when he was hit on the head by a bottle and his hand was caught by the machine causing his injury (472a).

The Superintendent of Southbridge, Mr. Herman, testified that he had received instructions concerning the compactor from a representative of Auto Pak, which particularly related to the manner of the operation of the machine (74a).

Based upon his experience, Herman did not allow the machine to run on a 24-hour basis, but rather turned it on each morning, afternoon and evening, depending upon the build up of garbage in the chute (78a).

It was necessary during the operation of this compactor to have a porter in attendance (77a-79a), to make sure that garbage did not get stuck.

The plaintiff and other porters employed by Southbridge were supplied by Southbridge with a stick to move the garbage and dislodge it when it became stuck. Mr. Herman testified (80a):

> "Q. And, if you didn't give them a stick they would have put their hand inside, sir? A. Never.
> "Q. If you didn't give them a stick, would they have put their hand inside? A. No, they didn't have to put their hand inside.
> "Q. Even without a stick, they didn't have to put their hand in? A. With or without a stick" (80a-81a).

With respect to the use of the machine, the testimony of Mr. Herman is particularly significant. He supervised the maintenance of the building and gave orders to the porter (73a). The reason that they furnished a stick to the men using the compactor was because they didn't want the men to put their hand inside (80a). It was an open and obvious condition and the danger of putting your hand in a machine which was in operation was evident.

The plaintiff testified that there were several switches which would stop the machine and with which he was fully familiar. There was a switch on the wall which would "turn completely off the machine" (490a). It would shut off the electricity completely. He knew the purpose of the wall switch because it was pulled the first thing in the morning to start the machine in operation (494a). There was a switch on the machine which would shut it off and which he used on occasion (495a). His familiarity with shutting off the machine and the several devices furnished for that purpose was demonstrated by

his testimony that when he stopped operating the machine he shut the machine by turning the switch on the wall or the button on the machine (496a, 497a).

Despite this knowledge, the plaintiff testified that at the time of the accident he made no effort to turn off the machine before attempting to remove the block of wood which he said obstructed its operation.

The plaintiff testified that at the time of the accident his hand was "inside of the machine" (561a) and his head was in the hopper opening (562a). In fact he had both hands in the hopper (507a, 508a). He pursued this course of conduct despite the fact that he was never instructed to put his hand in the machine (512a, 513a). The plaintiff was five feet 10 inches tall (559a) and the hopper opening was three-four feet high, which was up to his midriff (560a). It is, therefore, readily demonstrated that for the plaintiff to perform what he testified to, he would be required to stoop in order to get his body into the machine. Obviously, he knew or should have known that exposing his body to the known danger would readily expose him to serious injuries. All of this could have been averted had the plaintiff either shut off the machine, with full knowledge of the various switches and buttons accomplishing this, or operating the ram in reverse, with which button he was similarly familiar.

With respect to the switches, the plaintiff testified as follows (489a):

> "A. There was a switch on the wall on the right side of the machine, another one on the right side of the machine in a secret way is a reverse way and a magic eye."

The plaintiff started using the compactor about 8:00 A. M. on the day of the accident and the accident oc-

curred about 10:00 A. M. The proof is clear and convincing that the job normally took approximately 1½ to 2 hours (470a, 51[illegible]). It is, therefore, implicit in this testimony, that Merced was performing a cleaning operation and failed to turn off the machine (117[illegible]).

There was testimony by Luis Rivera, a co-employee of the plaintiff and who was the Assistant Superintendent (599a). He described the work which Merced was required to perform (601a); and was present when Rivera was given instructions by himself and three others including Mr. Herman (603a). They explained the use of the reverse switch which would cause the ram in the machine to go in reverse. This was done by putting your finger on the button (606a). This witness spoke Spanish as well as English and he said that all of the employees who were present at these conferences all spoke English including the plaintiff.

Rivera also testified that meetings were held three or four times a month at which the plaintiff was present and at which time they were instructed in the use of the machine (609a-610a). The instructions to the plaintiff and others were that if something went wrong with the machine, they were to get in touch with their superiors, including Rivera (609a).

The testimony, of co-employee, Secundo Diaz, particularly with respect to the compactor, was to the same effect (734a-735a).

Secundo Diaz testified that he was employed by Southbridge for the past four years, having started sometime in 1970. He worked as a handyman until 1971, when he was promoted to Assistant Superintendent. Sulliverez was a foreman during that time, but had left and was in Puerto Rico (715a). He had instructed the plaintiff in the operation of the compactor, in December of 1971.

He showed him the location of the switches and the importance of turning off the switch before you even open the door for the lid (720a).

Diaz and Sulliverez told him how to operate the machine and in case of an emergency "he was instructed to close the machine" (605a).

Mr. Merced was also told by Rivera that "Under no circumstances put your hand or anything inside the machine" (607a). The way this machine operated it was unnecessary to open the hopper door (613a) and the porters were required to be in the room when the machine was working and if they left the room the machine was to be turned off (620a). The only time that the porters were allowed to use the sticks to break up the blockages in the machine in the Building #7 was from the upstairs to push the garbage down (627a).

The plaintiff's co-employee, Mr. Melendez, was called as a witness in the plaintiff's case. He testified to the use of the stick (261a). He too testified that the use of the stick was by "pushing down on the garbage" (263a) and that he never put his hand in the machine (272a), because he was given a stick to use.

When there were blockages or jams, the procedure developed by the building management was to use a stick (726a). However, he was instructed that: "He would shut the machine down, make sure the power was off, open up the hopper door and with the stick itself try to jam the garbage down" (726a). If that procedure didn't work, Mr. Merced was instructed to get in touch with Mr. Diaz (727a). He explicitly denied that he had ever instructed Mr. Merced to put his hand in the machine while it was working (736a).

Both sides produced experts with respect to the operation and the design of the machine. Although it was the contention of the plaintiff's expert that the machine should have had an interlocking device, it was apparent that the several switches which would stop the machine accomplished the same purpose. In effect, an interlock served no greater purpose than the several switches.

This compactor was a slow machine (168a); it moved at one speed all the time (169a) and the cycle time for the ram was between 27 and 45 seconds (186a, 660a). In other words, there was more than ample opportunity for the plaintiff to remove his hand even after violating the instructions by putting his hand into the hopper itself.

The jury rendered a verdict in favor of the plaintiff and against the defendant, Auto Pak. The trial court, having reserved to itself the issues raised by the third party complaint, directed that Auto Pak receive a contribution of 40% from the third party defendant, Southbridge (924a). Thereafter, on a motion n. o. v., Judge Tyler rendered a decision granting judgment in favor of Auto Pak, dismissing the plaintiff's complaint and for that reason dismissed the third party complaint (15a).

This appeal is being taken solely by the plaintiffs-appellants from the judgment dismissing the plaintiffs' complaint.

POINT I.

The evidence adduced established that the appellee, Auto Pak, did not fail in any duty which it owed to the plaintiff.

There is no question about the plaintiff's knowledge of the existence of the switch nor of the part it played in the operation of the compactor. The plaintiff had a 90-day probation period (633a) during which he was taught and observed the operation of this machine. Further, he had used it himself for several months and was not a stranger to it.

In the brief submitted on behalf of the appellants, counsel attempts to compare the facts in the instant case with that of a man who opened the hood of an automobile and jiggled a carburetor whereupon a piece of the motor came scooting out and hit him, causing his injury. Counsel overlooks the remarkable and readily discernible difference between facts in his hypothetical situation and those which were present here. It would be more in line if the operator of the automobile attempted to remove a stick from one of the fan belts in a running motor and then pleaded that he could not understand why the belt continued moving after he had released the piece of wood. It is ordinary common sense that one does not play around with a moving fan belt or one which is temporarily obstructed without first turning off the motor. It does not require extended argument to demonstrate that an automobile manufacturer does not have to post a warning on the automobile to advise against such rash conduct.

A similar fact situation was discussed in *Gugliemini v. Conigliaro,* 35 A. D. 2d 524, 313 N. Y. S. 2d 189, affd. 29 N. Y. 2d 930, affd. 329 N. Y. S. 2d 321. In that case,

the plaintiff rented a truck for use from the defendant. In the course of driving the truck the plaintiff had acquired first hand knowledge of its defective condition. The court, reversing a judgment in favor of the plaintiff and dismissing the complaint, held:

> "He thus exposed himself to a known danger and understood, or should have understood, that the raising of the body might lead to a collision with the bridge under which he was accustomed to operate the truck (cf. *Utica Mut. Ins. Co. v. Amsterdam Color Works*, 284 App. Div. 376, 379, 131 N. Y. S. 2d 782, 785, affd. 308 N. Y. 816, 125 N. E. 2d 871; cf. *Seidman v. M & R Air Conditioning Corporation*, 15 N. Y. 2d 814, 257 N. Y. S. 2d 935, 205 N. E. 2d 859). The knowledge of the driver of a motor vehicle that it has a serious mechanical defect prevents him from a recovery of damages for personal injuries incurred from an accident caused by that defect (cf. *Fried v. Korn*, 286 App. Div. 107, 141 N. Y. S. 2d 529, affd. 1 N. Y. 2d 691, 150 N. Y. S. 2d 798, 134 N. E. 2d 67; *Brady v. Gardner*, 20 A. D. 2d 858, 248 N. Y. S. 2d 164)."

In any event, an employee cannot shut his eyes to an obvious risk.

In the instant case, the work was not of such a character that the employee had no other way to proceed. All the plaintiff had to do was to shut down the machine and, if he could not dislodge the obstruction, call for proper assistance. The plaintiff chose to employ the method he did without taking the safety precautions by shutting off the power. This conduct in the face of the patent and obvious hazard bars his recovery.

We are not faced here with the situation presented in *Kaplan v. 48th Avenue Corp.*, 267 App. Div. 272. In the instant case, the plaintiff was not asked to abandon the

reasonable course of his work, but rather to comply with the instructions which he was given and which ordinary common sense indicated was the proper procedure; to wit, turn off the machine by the several devices at his disposal and of which he was aware. Similarly, the instructions of the plaintiff's superior were not followed in the instant case and the fact pattern present before this court is not of the same import as those in the case of *Broderick v. Caldwell-Wingate,* 301 N. Y. 182.

The facts in the instant case come more clearly within the legal principle articulated in the case of *Campo v. Scofield,* 301 N. Y. 468, wherein the Court of Appeals, Judge Fuld writing, held that the onion-topping machine involved in that case had patent hazards and dismissed the complaint. In that case the plaintiff was dropping a crate of onions into a moving machine when his hands became caught in its revolving rollers. The Court of Appeals held that the machine was neither negligently designed and constructed, nor that it contained a danger unknown to the plaintiff. In the course of the opinion Judge Fuld held:

> "We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof."
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> • • •
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> "To impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been—or, in our view, may be—imposed by judicial decision. Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against hidden defects and of giving notice of concealed dangers."

The similarity between the patent hazard in the *Campo* case and that present here is readily demonstrated. Deliberately putting your hand into a machine so as to release something which is deterring its motion is just as hazardous as putting it in a machine with revolving blades. The removal of the deterrent must set the machine in operation. All of this could have been readily avoided had the plaintiff simply shut off the power in the machine. He was not engaged by his employer as a mechanic and if there was any problem with the machine it was his obligation to refer the same to his employer so that a competent mechanic could make the necessary repairs.

There are many instrumentalities and machines which have, under some circumstances, patent and obvious hazards. Would one expect a knife to have a warning sign that the sharp edge should not be held in your palm? A handle is furnished for the purpose of safely using the knife. Similarly, here, the plaintiff had knowledge of the location of the button which would stop the operation of the machine and by that simple act could have averted the injuries he suffered.

The legal principle enunciated in *Campo v. Scofield, supra,* was followed in *Micallef v. Miehle Co.*, 46 A. D. 2d 790, 361 N. Y. S. 2d 25, where the court held:

> "A manufacturer may not be held to respond in damages for either negligence, breach of implied warranty or strict liability to a user injured by a patent danger or defect of which he knew or should have known and which he could have ascertained by examining the item in question (Uniform Commercial Code, §2-316, subd. [3], par. [b]; *Codling v. Paglia,* 32 N. Y. 2d 330, 345 N. Y. S. 2d 461, 298 N. E. 2d 622; *Tatik v. Miehle-Goss-Dexter, Inc.*, 28 A. D. 2d 1111, 284 N. Y. S. 2d 597, affd. 23

N. Y. 2d 828, 297 N. Y. S. 2d 586, 245 N. E. 2d 231; *Campo v. Scofield,* 301 N. Y. 468, 95 N. E. 2d 802)."

In *Campo v. Scofield, supra,* the Court of Appeals refers to the obligation of a manufacturer when a machine is used by a careless, ignorant or incompetent person and states in this respect:

> "And Professor Bohlen in his work on Torts, after noting 'the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse,' goes on to say (*op. cit.,* p. 126): 'As to this there can be no two opinions, but there is no need to invoke public policy to afford this protection. The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker.'"

This legal concept was further explored and followed in the case of *Meyer v. Gehl Co.,* 42 A. D. 2d 461, 348 N. Y. S. 2d 801; aff'd 36 N. Y. 2d 760, 368 Supp. 2d 834:

> "In the instant case, the foreseeability of the possible contact between the unloader wagon and a six-year old is beyond the requirements of the law so as to impose liability on the manufacturer. If, as the above quote from the *Campo* case indicates, that a manufacturer is not required to contemplate a misuse by a 'careless, ignorant, or incompetent person,' such manufacturer should not be held liable when the failure to avoid injury is the act of an infant. We hold that infancy alone cannot change a defect or dangerous condition which is patent into a condition of latency so as to impose liability on the maker. (Cf. *Inman v. Binghamton Housing Auth.,* 3 N. Y. 2d 137, 164 N. Y. S. 2d 699, 143 N. E. 2d 895.)"

Of similar import is the decision in *Bolm v. Triumph Corp.*, 33 N. Y. 2d 151, 350 N. Y. S. 2d 644, wherein the Court of Appeals refers to the decision in *Campo*, that the "manufacturer is under no duty to render a machine or other article 'more' safe as long as the danger to be avoided is obvious and patent to all * * *"

The doctrine enunciated in *McPherson v. Buick Motor Co.*, 217 N. Y. 382, does not extend to a situation involving patent defects; *Sarnoff v. Charles Schad, Inc.*, 2[illegible] N. Y. 2d 180, 292 N. Y. S. 2d 93.

The philosophy behind the rationale of the decision in *Campo v. Scofield, supra,* is explored and affirmed in the opinion rendered in the case of *Inman v. Binghamton Housing Authority,* 3 N. Y. 2d 137, 164 N. Y. S. 2d 699, where it held that the duty of a manufacturer is to guard against hidden defects and conceal dangers.

In the case of *Tatik v. Miehle-Goss-Dexter, Inc.*, 28 A. D. 2d 1111, 284 N. Y. S. 2d 597, the plaintiff offered proof by his experts that additional safeguards might have stopped the machine and avoided his injuries. The court held that there was no proof of a hidden or latent defect and the condition of which the plaintiff complained was "open, plainly visible and well known to plaintiff."

This court consistently has followed the principle of law in *Campo v. Scofield, supra.* See: *Messina v. Clark Equipment Co.*, 263 F. 2d 291 (C. A. 2), cert. denied 359 U. S. 1013; *Boroman v. Kaufman,* 387 F. 2d 582 (C. A. 2).

It is therefore readily demonstrated that the plaintiff knew the ram was a cutting device; that putting his hand in the machine itself would subject him to obvious harm; that there were buttons and switches available which could

either stop the machine completely, stop the flow of electrical current, or keep the ram in a retracted position. Despite these apparent safety measures, the plaintiff placed himself in this position of danger which resulted in his injuries.

It is respectfully submitted that the evidence in that instant case does not set forth a viable cause of action. Giving the plaintiff every fair inference and intendment from the evidence, he did not establish a legally sufficient cause of action and the verdict of the jury was appropriately set aside and the complaint dismissed. See: *Loewinthan v. Levine,* 299 N. Y. 372; *Mintz v. Festa,* 29 A. D. 2d 689, 287 N. Y. S. 2d 157; *Blum v. Fresh Grown Preserve Corp.,* 292 N. Y. 241.

The rule of law articulated in the foregoing authorities is precisely the same as in the Federal courts. See Rule 50 of the FRCP.

In *Woolf v. Transworld Airlines, Inc.,* 443 F. 2d 841 (10th Cir. 1971), the case was submitted to the jury which found for the plaintiff. The Trial Judge then granted the defendant's motion for a directed verdict and judgment n.o.v. The appellate court affirmed and stated in part:

> "We have said on numerous occasions that if the proof is so overwhelmingly preponderant in favor of movant so as to permit no other rational conclusion, it is the duty of the Trial Court to direct a verdict or enter a judgment n. o. v."

The appellants' argument that patentcy—latentcy is always one of fact is plainly not supported by the authorities adverted to herein, as particularly demonstrated by the decision in *Bowman v. Kaufman, supra.*

POINT II.

The plaintiff, Felix Merced, was guilty of contributory negligence as a matter of law.

The cases adverted to under Point I in this brief support the conclusion that the plaintiff, by his own conduct with knowledge of the harm the ram could cause and his awareness of the safety devices, was guilty of contributory negligence as a matter of law. In *Meyer v. Gehl, supra*, the court reviews the authorities on this proposition of law and concludes that even children can be guilty of carelessness.

In *Behm v. Seaman,* 45 A. D. 2d 673, 355 N. Y. S. 2d 794, the Appellate Court reflects on the dismissal of the complaint at the end of the plaintiff's case and comments on the facts in the following language:

> "The trial court dismissed the complaint at the end of plaintiff-appellant's case, and properly so, for there was complete absence of proof of freedom from contributory negligence on plaintiff's part. Quite to the contrary, the evidence, by plaintiff herself, was to the effect that, knowing that water was flowing into her kitchen from outside, she chose to put herself into a dangerous position by negotiating a slippery floor and then climbing a ladder to retrieve food from a kitchen cabinet. She fell from the ladder.

It is respectfully submitted that, under the facts in the instant case, the plaintiff brought about his injury by his careless conduct in doing something which was patently and obviously dangerous and hazardous and the conclusion arrived at by Judge Tyler, as recited in his opinion, is entirely supported by the evidence (14a):

"Therefore, it seems beyond serious dispute not only that plaintiff was guilty of negligence or carelessness on his part but, perhaps more importantly, that he was not one for whom the dangers of usage amounted to a latent or concealed defect."

CONCLUSION.

The judgment entered below should be affirmed.

Respectfully submitted,

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